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No. 88-1943

In The

Supreme Court of the United States

October Term, 1988

OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

CHARLES RICHMOND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The government's Question Presented section over-simplifies the several issues which it wishes the Court to address. A more appropriate statement follows:

1. Whether equitable estoppel may ever lie against the federal government.

2. Whether reliance on the published statement of the responsible federal agency, in response to specific inquiries from a disabled federal retiree and with the result that the retiree was deprived of a portion of his annuity, was reasonable and detrimental.

3. Whether the government engaged in affirmative misconduct.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Under the federal government's disability retirement program, a federal employee with five or more years of civilian service who is found disabled may retire and receive an annuity. 5 U.S.C. § 8337(a). If the retiree either recovers from his disability or has his earning capacity restored, his annuity is terminated. 5 U.S.C. § 8337(d); 5 C.F.R. § 831.502(f)(5); see also, e.g., *Lancellotti v. OPM*, 704 F.2d 91, 93 (3d Cir. 1983). In the latter event, discontinuance of the annuity begins six months after the end of the calendar year in which the earning capacity

was restored. 5 U.S.C. § 8337(d); 5 C.F.R. § 831.502(e)(3). Conversely, if earning capacity is again lost, the annuity recommences. 5 C.F.R. § 831.502(g)(2).

Eligibility is thus premised on two separate factors, the categorical requirement of disability and the income requirement established by the lost earning capacity rule. See *Crockett v. OPM*, 783 F.2d 193, 195 (Fed.Cir. 1986). The statute includes an explicit definition for determining whether the retiree meets the income test:

> Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. § 8337(d); see also 5 C.F.R. § 831.502(e)(3). It is thus a flexible limit which changes each year as the "current rate of pay of the position" formerly held by the retiree is enhanced by cost-of-living increases. See, e.g., *McLean v. OPM*, 800 F.2d 254, 255 (Fed.Cir. 1986). Accordingly, in order to know whether they will remain eligible, annuitants who are able to perform part-time or occasional work must keep abreast of the changing income limitations.

Prior to 1983, the definition of restored earning capacity had been narrower, thus allowing retirees greater latitude in their earnings. Under the prior wording, earning capacity was "deemed restored if in *each of 2 succeeding calendar years* the income . . . equals at least 80 percent of the current rate of pay . . . ." 5 U.S.C. § 8337(d) (1976 ed.) (emphasis supplied). The amendment (Pub. L. No. 97-253, § 302(a)(1), 96 Stat. 792 (1982)) thus changed

the frame of reference from two consecutive one-year periods to a single one-year period; as a result, instead of an annuity continuing when income exceeded the 80% limit in one year (assuming it remained below the limit in the next), it was terminated when the limit was reached in any given year. Compare 5 C.F.R. § 831.502(e)(2) (pre-1983 rule) with *id.*, § 831.502(e)(3) (post-1982 rule).

2. Respondent Charles Richmond, a Vietnam veteran, was formerly a civilian welder employed by the United States Department of the Navy. Richmond Appeal to Merit Systems Protection Board (MSPB) (July 3, 1987). Because of vision problems which were seriously aggravated by the conditions inherent in the nature of his occupation, he had to retire in 1981. Accordingly, since his disability prevented him from doing his work, he was found eligible by the petitioner, the Office of Personnel Management (OPM), for a permanent disability annuity, pursuant to 5 U.S.C. § 8337(a). Appendix to Petition for Certiorari (App.) 21a.

From 1982 through 1985, working as a part-time school bus driver, he had an annual average income of $12,494. App. 21a. Because of his disability and because his earnings were therefore considerably below 80% of the current pay scale of his former job with the Navy, he received the annuity every year up to 1987.

His income for 1986 was $19,936, which was higher than in the past because he accepted additional work, "overtime that was not available in other years." App. 12a; see also App. 21a. Because 80% of the 1986 level for his previous position was $19,016.74, OPM determined that his earnings in 1986 had exceeded the limit and

terminated his annuity six months after the end of 1986. App. 21a. Conversely, because his income in 1987 was only about $15,000 (App. 21a), and therefore well below the 80% limit for that year, his annuity was restored beginning in 1988. App. 1a n.1.

3. Mr. Richmond's acceptance of the additional work in 1986 put him over the limit by about $920; his earning capacity in that year was 83.9% of the level of his former job. By thus barely exceeding the 80% limit, he lost half of his annual annuity. See 5 U.S.C. § 8339.

This seemingly counter-productive process, by which he received wages slightly over the earning capacity limit in exchange for a 50% cut in his disability payments, was caused not by any misunderstanding on his part, but by blatantly incorrect information consistently provided to him by his former governmental employer and OPM. App. 21a-22a. Four years after § 8337(d) was amended to restrict the earning capacity test to a year-by-year analysis, Mr. Richmond had twice visited the site of his former employment at the Naval Public Works Center in San Diego in an effort to determine the exact contours of the eligibility requirements. As he had the opportunity in 1986 only for additional employment as a driver, he sought to determine how this temporary work would affect his rights to the annuity. Richmond Request for Reconsideration to OPM (May 29, 1987).

On both occasions, he spoke with the individuals responsible for providing this kind of information, the Navy Employee Relations Specialists. He specifically inquired about the earning capacity rules. App. 2a, 21a. In response, they informed him orally that a disability

retiree's earning capacity was evaluated by reference to two successive years; only if earnings in each year exceeded the limit in each year would earning capacity be deemed to be restored and the annuity terminated. To definitively establish that this was in fact the rule, he was given, on both occasions, the official OPM publication on this issue, Federal Personnel Manual (FPM) Letter 831-64, Attachment 4, which also stated that earning capacity was measured by reference to each of two consecutive years. App. 22a. The FPM Letter had been correct when it was published in 1981, prior to the amendment to § 8337, but OPM had not changed it in the years between that amendment and Mr. Richmond's effort to determine the eligibility rules.

Relying on this erroneous written and oral information, Mr. Richmond accepted the additional work in 1986. He believed that it "would temporarily increase his income, but would not cause loss of his disability benefits." App. 3a. Indeed, based on the information repeatedly imparted to him, his earnings were never close to the limit. In both the years before and after 1986, which were relevant pursuant to FPM Letter 831-64, his earnings were well below the statutory limit; his 1986 earnings, as he was thus led to believe, should have had no effect on his continued right to an annuity. As a consequence of that extra work, however, his earnings were slightly over the limit; he lost half of his 1987 annuity because of "misinformation upon which he relied . . . ." App. 22a.

4. By letter dated May 12, 1987, OPM informed him for the first time that the law actually required evaluation of earnings on a year-by-year basis. Given his earnings in 1986, he was therefore "considered to be restored to

earning capacity and . . . no longer entitled to continue receiving a monthly disability annuity benefit, even though your medical condition may not have changed." App. 25a.

He appealed to the MSPB on the ground that the government should not be permitted to apply the revised § 8337 when it had consistently given him contrary information based on the previous version of § 8337. This argument was rejected by an administrative judge (App. 20a), and that decision became final when the MSPB denied his petition for review. App. 32a. His timely appeal to the Federal Circuit, for which he continued to represent himself, resulted in reversal of OPM's decision.

The majority opinion noted initially that this Court had recently refused to accede to the government's urging that equitable estoppel should never apply against the government. App. 4a-5a. It then held that the traditional elements of estoppel had been met: the government knew after 1982 that the earning capacity test required examination of each year's earnings; the government consistently gave Mr. Richmond the wrong information about the test with the intent that he rely on it; and Mr. Richmond reasonably relied on that misinformation and thereby changed his position for the worse. App. 9a.

Next, the Court of Appeals determined that the government's behavior was sufficiently egregious as to satisfy the additional requirement, established by this Court, of affirmative misconduct:

> [T]he government's action in providing Richmond with an OPM letter which summarized a law which had been changed some 4 years earlier is sufficient "misconduct" for estoppel to apply. To provide such a letter to an individual who apparently made specific requests for current written information through what appeared to be the correct channels is reckless, at the very least.

App. 9a-10a; see also App. 14a.

The majority made several other noteworthy observations drawing on this Court's estoppel holdings and their applicability to this case. First, they noted that "the logic of the landmark decisions leads to the conclusion that the most crucial consideration is the objective reasonableness of the reliance." App. 11a-12a. Reliance on solely oral advice, or on advice "from persons who were not cloaked with the mantle of authority to speak for the government as to legal requirements," has not been deemed reasonable – but those facts were not present here. App. 12a.

Secondly, the majority repudiated the suggestion made by the dissent (and repeated here by the government) that Mr. Richmond's action was manipulative. They pointed out that his increase in earnings was only temporary, and that this was not an instance where an annuitant had declined a raise or a new permanent position in order to maintain an artificially low salary. He was trying merely to determine the eligibility conditions, and, based on that determination, to make a rational decision as to whether he should accept temporary, additional work. App. 12a.

Finally, the court observed that it was inappropriate to treat his reliance as unreasonable on the theory that knowledge of the law is presumed. Mr. Richmond could

not be expected "to know the specific statutory provisions as they change from time to time . . . ." App. 13a. Indeed, he sought assistance from the very government sources which are authorized to supply this information, and they provided written confirmation of the eligibility conditions. App. 13a.

Given these "unusual and extreme" factors, the court concluded, this was a proper instance to estop the government: "Estoppel, after all, being equitable, necessarily is based on preserving fairness on the specific facts of the case before the court." App. 14a.

The dissenting judge premised his contrary conclusion on a belief that Mr. Richmond had engaged in some sort of "abuse", an effort to "gerrymand . . . earnings to get extra money from the taxpayers." App. 19a. Thus, underlying his legal analysis is the insinuation that Mr. Richmond did not come before the court with clean hands and is therefore not deserving of equitable relief.

The government petitioned the panel for rehearing, and that was denied. App. 31a.

REASONS FOR DENYING THE WRIT

I. THE GOVERNMENT'S EFFORT TO IMPUGN MR. RICHMOND'S MOTIVES SHOULD BE REJECTED AND SHOULD NOT OBSCURE THE FACT THAT IT WAS THE GOVERNMENT'S MISCONDUCT WHICH CREATED THIS SITUATION

The government has taken a relatively simple case, with the barest of records, and asked this Court to use it

as a vehicle to effect major policy reversals with respect to the doctrine of equitable estoppel. In making this effort, it has sought to malign the respondent, apparently in order to suggest that equitable relief is inappropriate and to distract attention from its own misbehavior.

The record does disclose that this is a straightforward instance of repeated, longstanding, and inexcusable behavior by a government agency, with the direct result that a permanently disabled federal retiree, who had done everything possible to inform himself of relevant eligibility conditions, lost a substantial portion of his annual income. In the government's twisting of events, however, the equities have been reversed, with the disabled annuitant a manipulator (Petition at 14) and the government exonerated from any wrongdoing because "[r]eliance on the words of a government employee . . . can never be reasonable. . . ." Petition at 12. Before proceeding further, therefore, it is imperative to correct the misperceptions and innuendoes presented in the Petition.

The government states:

> At the heart of this lawsuit is respondent's complaint that he missed the opportunity to manipulate the law for his personal gain . . . .This desire to work the system as close to the edge as possible, while not illegal, is surely not the type of detriment that traditionally supports an estoppel.

Petition at 14-15. Given this assumption that Mr. Richmond was acting improperly, it is not surprising that the government has also misstated the nature of the disability

program, as it expressly equates "a restored capacity to earn" with "a loss of disability." Petition at 15.

The inaccuracy of these remarks is easily seen. First, the two eligibility conditions of § 8337 are separate and unrelated factors: "The rationale underlying disability retirement benefits is not compensation simply for having a disability. The disability must be coupled with a substantial inability to earn income." *Crockett v. OPM*, 783 F.2d at 195. Consequently, the restoration of earning capacity does not in any way suggest that the disability has ended. See OPM's Notice of May 12, 1987 to Mr. Richmond (App. 25a). The government's insinuation that Mr. Richmond ceased to be disabled and was improperly trying to live off the taxpayers is therefore as inaccurate as it is objectionable. His continued disability has never been in question.

The complementary position is also wrong. The government suggests that Mr. Richmond was attempting to earn as close to the limit as possible and therefore the equities do not demand redress for him when he mistakenly went over the limit. Mr. Richmond, however, was nowhere near the limit which he believed to be in effect. Had he been so intent on manipulating the system, it seems unlikely that his earnings in 1986 would have been only a few percentage points over the 80% level; given his belief that his earnings could surpass the 80% level in one year without limitation as long as they fell below in the next, he could have earned considerably more with no impact – he believed – on his annuity.

Moreover, it is undisputed that in the years before and after 1986 his earnings were well below the 80%

limit. To term this a "desire to work the system as close to the edge as possible" is demonstrative not of Mr. Richmond's intentions, but of the government's decision to malign him as a means of improving the balance of equities.

It is quite apparent why Mr. Richmond sought assistance from the government, and it was neither reprehensible nor in bad faith. It was, instead, an entirely rational act. For four years his earnings from part-time employment had been well below the limit. When it became apparent that he might be able to obtain temporary additional employment in 1986, he sought to determine what effect, if any, that would have on his annuity. Informed for all practical purposes that he could earn without limit in 1986, he accepted the additional work. As the majority noted below, this was *not* an instance where "an annuitant was offered a raise that would put him permanently over the limit, but asked the employer to decrease the raise so as to maintain eligibility." App. 12a. Rather, this was a logical decision to accept one-time-only work because it would not, he was informed, affect his annuity status.

Instead of employing a subjective or many-factored test for determining the restoration of earning capacity, Congress established the 80% level as a simple objective measurement. Using such a blunt demarcation inevitably results in some annuitants falling just above or below the line. See, e.g., *Lancellotti v. OPM*, 704 F.2d at 99-100. Given the importance of that limit, therefore, it is entirely reasonable for annuitants to familiarize themselves with the

rules and to take them into consideration when evaluating temporary work opportunities.[1]

Thus, the Court should recognize that Mr. Richmond's behavior was a logical response to his situation; he was merely attempting to establish his options. The issue of this case is not Mr. Richmond's rational effort to obtain relevant information, but the government's consistently inaccurate responses to his inquiries.

II. ON NEITHER BROAD NOR NARROW GROUNDS IS THERE ANY BASIS FOR REVIEWING THE DECISION BELOW

This case presents a relatively simple instance of estoppel because of affirmative misconduct. The government's response, however, is a sweeping attack on every aspect of the decision below, including the very concept of estoppel against the government. But this case is inappropriate for such extensive policy determinations. If the Court is to consider repudiating its prior holdings on the applicability of estoppel and other equitable approaches to governmental misdeeds, its vehicle should have a fully developed record and history. While important to Mr. Richmond, of course, this case is not the significant litigation from which this Court should launch major analyses of long-established doctrines. Compare, e.g., *Watkins v.*

[1] The earning capacity test resembles the excess earnings test for recipients of Social Security retirement. Under that rule, each dollar earned above a certain limit results in a 50% reduction in benefits. 42 U.S.C. § 403(f)(3). It has never been suggested that it is improper for these recipients to restrict the amount of their work in order to avoid exceeding the limit.

U.S. Army, 875 F.2d 699 (9th Cir. 1989) (*en banc* court splits 6-5 in favor of estopping the Army).

1. The government first contends that this Court should expressly reject estoppel against the government because, "[s]ince its earliest cases, this Court has ruled that the government may not be estopped from enforcing the laws." Petition at 8 (footnote omitted). That is a misstatement. Moreover, the conclusion has been rejected before by this Court, and no new rationale has been offered for a different result.

In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984), the Court observed that, in at least two cases, it had held "that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." In one of those decisions, *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674 (1973) ("*PICCO*"), this Court determined that when the government, by longstanding construction of a statute, had "affirmatively misled" a corporation into believing that its actions were not criminal, "traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."

That the decision rests on equitable estoppel principles is apparent not only from the nature of the potential remedy, but also from the Court's citation to two law review articles on estoppel and, most importantly, from the discussion as to whether there was reasonable reliance. 411 U.S. at 674, 675. The suggestion that the government might have "affirmatively misled" the corporation is also consistent with the affirmative misconduct

language which this Court has employed in a more general sense.[2]

In addition to repudiating the government's contention that this Court has never found an estoppel against the government, *PICCO* is significant for another reason: it bears a striking similarity to the instant case on a critical point. Like Mr. Richmond, the corporation was expressly informed in written materials by the "responsible administrative agency" (411 U.S. at 674) that the statute had a particular meaning – a meaning which the government later disavowed. And, like Mr. Richmond, the company took action in reliance for which the government later sought to hold it responsible. This Court, however, viewed notions of fairness and equity as providing a rationale to prohibit the government from applying the statute as written. That willingness contradicts the government's contention here that it "cannot be estopped from enforcing a lawful statute . . . ." Petition at 10.

The other case cited in *Community Health Services* is *Moser v. United States*, 341 U.S. 41 (1951). Although the Court there purported not to evaluate under estoppel principles, see *id.* at 47, its analysis of the equities produced a result no different than would have flowed from an equitable estoppel approach. It is not surprising, then,

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[2] The concurrence in *Community Health Services* states without elaboration that *PICCO* is not a "traditional equitable estoppel case." 467 U.S. at 68 (Rehnquist, J., concurring in the judgment). But the discussion of reliance and of the corporation being affirmatively misled belies that characterization.

that this Court recognized *Moser* in the *Community Health Services* discussion.

Moser too is strongly supportive of the respondent's argument here. In that case, the law permitted "a choice of exemption [from the draft] and no citizenship, or no exemption and citizenship," 341 U.S. at 46, but the form signed by the claimant did not state that claiming the exemption created a statutory bar to citizenship. Because the form failed to indicate that he was signing away this right, however, the Court determined that "elementary fairness" required that he be naturalized. *Id.* at 47.

Although the benefits at issue are different, the structure of *Moser* is very similar to that in this case. In both instances, the claimant enjoyed a right to the benefit, and that benefit was lost solely because of the incorrect information provided by the government. Both sought the needed information from the proper source, and both received the wrong information. See *id.* at 46. Just as Mr. Moser relied on the government to sign a form which he would otherwise not have signed (*ibid.*), so too did Mr. Richmond take action (additional work) which he otherwise would not have taken. In both instances, the "justifiable reliance" (*ibid.*) was the inducement for an action which deprived them of a right to which they were previously entitled. This Court's recognition of the distinction between the lack of loss in *Community Health Services* and the loss of a vested right in *Moser* (467 U.S. at 62 n.14) directly supports the application of estoppel here, where, as in *Moser*, a vested right was lost.[3]

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[3] In addition to these cases, this Court has applied similar equitable principles with comparable results in other instances.

(Continued on following page)

The government argues also that the alleged "rule prohibiting estoppel is critical to the government's effective operation." Petition at 10. Presumably, it made the same contention in *Community Health Services*, but this Court expressly declined to embrace "a flat rule" against estopping the government. 467 U.S. at 60. The Court there noted that the "interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government" precluded it from concluding that estoppel should never lie. *Ibid.* (footnote omitted).

Accordingly, the lower courts have continued to consider estoppel as potentially applicable against the government. See, e.g., cases cited in Petition at 19-22. There is no evidence that these occasional determinations have crippled the government's effective operation. The government has always operated with the possibility of its

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In *Honda v. Clark*, 386 U.S. 484, 486 (1967), the Court declined to employ estoppel language, but, as one commentator has observed, "its action was an estoppel in all but name." Note, *Equitable Estoppel of the Government*, 79 Colum.L.Rev. 551, 567 n.104 (1979). The Court relied on the "equitable doctrine of tolling" to allow potential beneficiaries who had not filed their claims within the statutory time limit to pursue their rights.

Also on point is a recent unanimous decision relying on *Honda*. In *Bowen v. City of New York*, 476 U.S. 467, 480-481 (1986), the Court again tolled a statutory time limit for filing, citing the government's misconduct in following a secret policy. The Court repudiated the suggestion, also made here (see Petition at 10, 11), that equitable doctrines are inapplicable where payment from the treasury would result. 476 U.S. at 479.

actions being estopped, and there has been no indication of impending chaos as a result.

The government's rhetorical flourishes ignore the underlying premise of equitable estoppel and its relatively minimal impact on governmental operations. In *Community Health Services*, 467 U.S. at 59, this Court stated: "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. . . .[A] hallmark of the doctrine is its flexible application . . . ." Yet the government claims that its very existence threatens governmental operation. The fact is, though, that estoppel is only infrequently applied to the government. See, e.g., App. 14a ("unusual and extreme" facts below warranted estoppel). With this Court's added requirement of "affirmative misconduct", there will be relatively few situations which meet the test. See Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U.Chi.L.Rev. 1026, 1046-1047 (1986). But, on those rare occasions where the injustice produced by improper governmental behavior demands that equitable considerations take precedence, estoppel should continue to be available.

In light of the history of estoppel against the government, in this Court and in the lower courts, no reason exists to eradicate this already narrowly tailored mechanism. Just as the Court saw no reason to take such a drastic step in *Community Health Services*, so too should it reject the government's broad attack here and deny the petition.

2. The government's second contention is that the reliance in this instance was neither reasonable nor detrimental. Petition at 12-15. It relies primarily on *Community Health Services*, but fails to note the significant differences between the situations.

First, a crucial component of this Court's decision was that the party seeking estoppel *never* had entitlement to the payments at issue, so that receiving those payments meant that "the consequences of the Government's misconduct were not entirely adverse." 467 U.S. at 61. The private party had the use of government funds for a lengthy period of time; it "lost no rights but merely was induced to do something which could be corrected at a later time." *Id.* at 62.

Mr. Richmond's situation differs in every respect. The payments at issue here were his: he had a vested right to them as a federal retiree who met all the eligibility conditions. Far from being misled into accepting funds to which he was not entitled, he was induced to take action which deprived him of his existing entitlement. He would have been better off had he not sought assistance from the government, because that action led directly to his loss of entitlement. In that regard, this situation satisfies precisely the standard established by this Court: "When a private party is deprived of something to which it was entitled of right, it has surely suffered a detrimental change in its position." *Id.* at 62.

Morever, unlike in *Community Health Services*, 467 U.S. at 62 & n.15, and in *Schweiker v. Hansen*, 450 U.S. 785,

789 (1981), once he had relied on the government and taken action, the effect could never be corrected. Under the statutory scheme, his acceptance of additional work deprived him of his annuity; he could not simply return the money, as in *Community Health Services*, or file an application, as in *Hansen*. The corporation and Mrs. Hansen relied passively by doing nothing to affect eligibility which they had never possessed in the first place; Mr. Richmond was in the opposite situation: he took action in reliance which deprived him of existing eligibility.

Secondly, the reliance here was based on a written document, a distinction cited as relevant by the court below. App. 10a-11a. The government attempts to infer a significant departure from other cases in that analysis (see Petition at 12-13), but the court was not, as the government trumpets, suggesting that all inaccurate written advice mandates estoppel. It was simply observing that written advice is more compelling and therefore more appropriate for applying estoppel, as this Court has consistently indicated. *Community Health Services*, 467 U.S. at 65; *Hansen*, 450 U.S. at 788.

Contrary to the government's argument, this was not a situation where a potential beneficiary simply picked up an "out-of-date circular[ ]." Petition at 13. Mr. Richmond asked specific questions, and received the FPM Letter in direct response to those questions. OPM had not bothered to correct it in four years, which contrasts with this Court's tolerance of the failure to provide correct information after a "recent amendment" (1-1/2 years

before). *Hansen*, 450 U.S. at 789. Finding the government estopped in these circumstances was not an abandonment of precedent, and the government greatly overstates the significance of the decision below by claiming that it will "confer[ ] estoppel claims on any number of individuals . . . ." Petition at 13.

This case also significantly differs from *Community Health Services* because of the nature of the information sought. The corporation in that case asked for clarification of an ambiguous federal policy from a non-governmental agent:

> As a recipient of public funds well acquainted with the role of a fiscal intermediary, [Community Health Services] knew [that the intermediary] acted only as a conduit; it could not resolve policy questions . . . .Yet [Community Health Services] made no attempt to have the question resolved by the Secretary; it was satisfied with the policy judgment of a mere conduit.

467 U.S. at 64-65.

The difference is dramatic. Mr. Richmond sought not a policy clarification, but a simple eligibility condition which required no legal interpretation and which was explicitly set out in the statute. He sought it from the government itself, and received the response both from his former employer and from the agency expressly authorized to provide such information. This was neither a complicated situation nor one which should have suggested to him that additional steps should be taken. He went twice to the proper source, and received the same information on both occasions, orally and in writing. These factors stand in sharp contrast with the lax actions

of a sophisticated institution which dealt regularly with the government and was fully aware that it was seeking an interpretation of a complex area from a non-governmental intermediary.[4]

Mr. Richmond lost thousands of dollars because he undercut his established entitlement by relying on the consistent written statements of the responsible governmental authorities. His reliance was reasonable and detrimental, and that factor therefore provides no basis for granting the petition.

3. The government claims finally that its action here does not rise to the level of affirmative misconduct, and that, in any event, clarification of that standard demands review.[5]

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[4] The suggestion that Mr. Richmond had the same obligation as a company conducting business with the government under the Medicare statute (see Petition at 12) is unrealistic. The court below correctly recognized that an individual annuitant is not similarly situated and cannot be saddled with the same presumptions. App. 13a. The government's view of "reasonable" reliance would render it impossible to satisfy that standard in *any* circumstance where the information provided differed from statutory authority.

[5] To the extent that the government contends that there may never be affirmative misconduct where an estoppel would interfere with the execution of the laws (see Petition at 16), the argument has essentially been repudiated by this Court's holdings in such cases as *PICCO*, *Moser*, and *City of New York*. See *supra*, at 15 & n.3. The commentators have uniformly agreed that estoppel against the government is appropriate "in order to vindicate the more fundamental purposes of a statute." Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53

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a. By the latter contention, the government is again seeking a simplistic and virtually impregnable rule. This contradicts the very nature of the estoppel doctrine, however, which is "equitable," "flexible," and geared to "particular cases." *Community Health Services*, 467 U.S. at 59; see also, e.g., App. 5a ("courts of appeals have determined whether, on the facts of a given case, estoppel should be applied against the government"). As a consequence, action which might be considered affirmative misconduct in one case should not necessarily be so considered in another context.

For instance, as the court below held, providing a blatantly inaccurate written statement of eligibility conditions, which has been out of date for four years, to a beneficiary untrained in the law, is the kind of reckless behavior which amounts to affirmative misconduct. App. 9a-10a. But the same failings directed at a corporate entity with in-house counsel would not necessarily be so defined.

The existence of affirmative misconduct depends upon a variety of factors, such as who provided the information, in what form, when, how often, to whom, and in response to what specific inquiry (if any). These and other considerations cannot realistically be incorporated into a simple definition. The complexities inherent in a flexible concept such as estoppel preclude establishing a strict definition. While that fluidity may sometimes

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U.Chi.L.Rev. 1026, 1043 (1986); see also, e.g., Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 St.John's L.Rev. 114, 135 (1981); Note, *Equitable Estoppel of the Government*, 79 Colum.L.Rev. 551, 566 (1979).

appear to suggest only that courts "will know an estoppel when [they] see one," *Hansen*, 450 U.S. at 792 (Marshall, J., dissenting), the alternative, an unyielding definition which will occasion a loss of estoppel's traditional flexibility, is less desirable.[6]

b. The government also contends that there cannot be affirmative misconduct here because of the alleged similarities to *Hansen*. Petition at 17-18. The differences are major, however. First, the information here was provided in written form from the responsible agency. That does not always mean that the misconduct was affirmative, but there is no dispute that a writing is more strongly suggestive of that determination. See *Hansen*, 450 U.S. at 788.

Secondly, this is not an instance where the claimant's confusion or other mitigating circumstances induced a low-level official to provide incorrect or misleading information, which would dilute the government's burden. *Id.* at 789; see also *id.* at 795 (Marshall, J., dissenting). There has never been any dispute that Mr. Richmond made specific inquiries about discrete eligibility conditions. The change in the law was not "recent", as in *Hansen*, and the

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[6] Contrary to the government's statement that success on an estoppel claim may depend "on the federal court in which it is heard" (Petition at 23), the outcome is more likely to depend on the wide variety of relevant facts which are invariably raised in such cases. Accord, *Watkins v. U.S. Army*, 875 F.2d at 707 (in detecting affirmative misconduct, "each case must be decided on its own particular facts and circumstances").

response came both from trained specialists and in writing from the responsible federal agency. There is no question that the government was entirely at fault, for it had taken no action to correct inaccurate written information for four years.

Moreover, this was not a "minor breach" of internal agency policy for which estopping the government would henceforth require its agents to "follow instructions to the last detail . . . ." *Id.* at 789-790. This was a blatant misstatement of a key eligibility condition; correctly imparting this crucial change in the law should have been a major goal for OPM, and its long-term failure in this regard is far removed from the "detail" overlooked in *Hansen*.

Finally, the government's conduct here caused the loss of eligibility which could not be corrected. The necessary effect of the misinformation was not a failure to take action which would have led to eligibility, as was the case in *Hansen*; here, Mr. Richmond was induced to take action which resulted in a loss of eligibility that could never be altered. Once he had performed the additional work, he could not, under the statutory scheme, retrieve his lost benefits. By contrast, Mrs. Hansen, who could not be eligible until she applied (see *id.* at 790), could have, at any time, corrected the situation simply by applying. In short, the government's action in *Hansen* discouraged the attainment of eligibility, but here it caused the loss of

eligibility. As this Court's analysis in *Hansen* suggests, this is a far more serious form of misconduct.[7]

The misconduct here was considerably more egregious than a one-time negligent act, for it caused the permanent deprivation of an entitlement which was Mr. Richmond's before he sought assistance from the government. It was "reckless", as the court below found, and there is no basis for disturbing that holding.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1989

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[7] The other decisions relied on by the government (Petition at 17 & n.10) likewise involve situations where the governmental misconduct did not deprive the claimant of a right or benefit to which he was already statutorily entitled, but, rather, either discouraged him from attaining a benefit for which he was not yet eligible or led him to believe that he was eligible for a benefit that was legally unattainable. Other significant distinctions also are apparent; for instance, in *Montana v. Kennedy*, 366 U.S. 308, 314 (1961), the oral statement on which reliance was premised "may have been only the consular official's well-meant advice" rather than the statement of law that it was understood to be.